

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

Case No. 2012010886

DEREK C.,

Claimant,

vs.

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agency.

DECISION

The hearing in the above-captioned matter was held on March 12, 2012, at Alhambra, California, before Glynda B. Gomez, Administrative law Judge (ALJ), Office of Administrative Hearings (OAH). Eastern Los Angeles Regional Center (ELARC or Service Agency) was represented by Arturo De La Torre, Supervisor School Age Program. Claimant Derek C. (Claimant) was represented by his mother (Mother). Claimant, his maternal grandmother (Grandmother) and his godmother were also present for the hearing.

Evidence was received, argument was heard, and the case was submitted for decision on March 12, 2012.

ISSUE PRESENTED

Must the Service Agency provide in-home respite care (IH respite) in lieu of providing the same amount of out-of-home respite care (OOH respite), when Claimant already receives 24 hours of IH respite per month?

FACTUAL FINDINGS

1. Claimant is a 6 year old boy who is a consumer of services provided by the Service Agency pursuant to the Lanterman Developmental Disabilities Services Act

(Lanterman Act), California Welfare and Institutions Code, section 4500, et seq.¹ Claimant is eligible for services based on his diagnosis of Autism.

2. Claimant lives with Mother and his maternal uncle in Whittier, California. He attends a special day class at Phelan elementary school where he receives school based occupational therapy, speech therapy and roundtrip transportation to and from school. Claimant requires constant supervision to avoid injury and self harm. Claimant has panic attacks, disruptive behaviors, self-stimulatory behavior, emotional outbursts and tends to wander away. He also requires assistance with bathing, dressing, feeding and self care tasks. Claimant requires pull-up diapers for night time incontinence. Claimant has limited verbal abilities and his speech is mostly unintelligible to familiar listeners, including Mother.

3. Pursuant to the Individual Program Plan (IPP) developed between Claimant and the Service Agency on January 13, 2011, as amended by addendum dated January 12, 2012, Claimant received 24 hours per month of IH respite. The IH respite hours consist of 16 hours per month with temporary authorization for eight additional hours per month. The additional eight hours of IH respite must be reviewed and reauthorized every six months. The IPP also provided for 21 days of IH respite in lieu of OOH respite.

4. In May of 2011, as a result of changes to the Lanterman Act, the Service Agency adopted new guidelines regarding the use of OOH respite. The Service Agency began implementation of the new guidelines in August of 2011. Part III of these new guidelines provides that “[i]n home respite in lieu of out of home respite may be used only when there is no out of home respite arrangement available.”

5. On January 12, 2012, Service Agency provided Claimant with a Notice of Proposed Action (NOPA) stating that the Service Agency would no longer fund 21 days of IH respite in lieu of 21 days of OOH respite without adherence to its OOH respite purchase of services policy and procedure effective February 12, 2012. Claimant filed a request for fair hearing appealing the action outlined in the NOPA on January 23, 2012. On February 24, 2012, the Service Agency issued a decision after informal hearing confirming the proposed action set forth in the NOPA.

6. Claimant has used OOH respite in lieu of IH respite for three years with his grandmother as the service provider. This arrangement has provided Mother with an opportunity to take a break from Claimant while leaving him with a trusted and familiar caregiver in familiar surroundings. Mother is concerned that leaving Claimant in the care of strangers in unfamiliar surroundings will trigger his panic attacks, and believes he may have been unintentionally injured by a service provider employee in the past. Mother does not want Claimant to be cared for in an out-of-home facility because she is concerned that he

¹ All statutory references are to the Welfare and Institutions Code, unless otherwise noted.

may be injured or elope from the premises. She is also concerned that he will be unable to tell her if he has been injured or otherwise violated because of his limited verbal abilities.

7. Claimant's physician Dr. Gustavo Casillas of Alta Medical Dental Group provided a note written on a prescription pad dated February 10, 2012, which stated:

"I request that my patient [Claimant], dob 1/27/06 remain at home under 24 hour observation under supervision of a family member and not in an unfamiliar setting such as a group home that may trigger regression and behavior that may be dangerous to him and others."

8. At hearing, Mother expressed that although she is concerned about placement in an out-of-home facility, she was willing to visit some facilities and explore whether or not appropriate out-of-home facilities are available for provision of OOH respite to Claimant.

LEGAL CONCLUSIONS

1. ELARC contends that it is prohibited from providing IH respite in lieu of OOH respite except in instances when there is no appropriate out-of-home respite arrangement available with a vendored facility.

2. Claimant contends that there is no appropriate out-of-home facility which is safe for him and that he should be allowed to continue his use of IH respite in lieu of OOH respite without exploring vendored facilities. For the reasons set forth below, Claimant's appeal is denied.

3. The initial burden of proof is on the Service Agency as the party seeking to terminate the service or change the status quo. If the Service Agency establishes that the service it seeks to terminate is a service barred by the recent amendments to the Lanterman Developmental Disabilities Services Act² (Lanterman Act), the burden shifts to the party seeking to retain the services to prove that the services come within an exception to the Lanterman Act amendments. The burden of proof in this matter is a preponderance of the evidence. (See Evid. Code, §§ 115 and 500.)

4. Services are to be provided to regional center clients in conformity with the IPP, per section 4646, subdivision (d), and section 4512, subdivision (b). Consumer choice is to play a part in the construction of the IPP. Where the parties can not agree on the terms and conditions of the IPP, a Fair Hearing may establish such terms. (See §§ 4646, subd. (g); 4710.5, subd. (a).)

5. The services to be provided to any consumer of regional center services must be individually suited to meet the unique needs of the individual consumer in question, and

² Welfare and Institutions Code section 4500 et seq.

within the bounds of the law each consumer's particular needs must be met. (See, e.g., §§ 4500.5, subd. (d), 4501, 4502, 4502.1, 4512, subd. (b), 4640.7, subd. (a), 4646, subd. (a) and (b), 4648, subds. (a)(1) and (a)(2).) Otherwise, no IPP would have to be undertaken; the regional centers could simply provide the same services for all consumers. The Lanterman Act assigns a priority to maximizing the client's participation in the community. (§§ 4646.5, subd. (2); 4648, subd. (a)(1) & (a)(2).)

6. Section 4512, subdivision (b), of the Lanterman Act states in part:

‘Services and supports for persons with developmental disabilities’ means specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives. The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of . . . the consumer’s family, and shall include consideration of . . . the effectiveness of each option of meeting the goals stated in the individual program plan, and the cost-effectiveness of each option. Services and supports listed in the individual program plan may include, but are not limited to, diagnosis, evaluation, treatment, personal care, day care, . . . special living arrangements, physical, occupational, and speech therapy, . . . education, . . . recreation, . . . respite, . . .

7. Services provided must be cost effective (§ 4512, subd. (b), *supra*), and the Lanterman Act requires the regional centers to control costs as far as possible and to otherwise conserve resources that must be shared by many consumers. (See, e.g., §§ 4640.7, subd. (b), 4651, subd. (a), 4659, and 4697)

8. Services are to be chosen through the IPP process. (§ 4512, subd. (b).) The regional center is also to utilize the service coordination model, in which each consumer shall have a designated service coordinator “who is responsible for providing or ensuring that needed services and supports are available to the consumer.” (§ 4640.7, subd. (b).)

9. The IPP is to be prepared jointly by the planning team, and services purchased or otherwise obtained by agreement between the regional center representative and the consumer or his or her parents or guardian. (§ 4646, subd. (d).) The planning team, which is to determine the content of the IPP and the services to be purchased is made up of the disabled individual, or his or her parents, guardian or representative, one or more regional center representatives, including the designated service coordinator, and any person, including service providers, invited by the consumer. (§ 4512, subd. (j).)

10. Pursuant to section 4646, subdivision (a), the planning process is to take into account the needs and preferences of the consumer and his or her family, “where appropriate.” Further, services and supports are to assist disabled consumers in achieving the greatest amount of self-sufficiency possible; the planning team is to give the highest preference to services and supports that will enable a minor child with developmental disabilities to remain with his or her family. (§ 4648, subd. (a)(1).)

11. “In-home respite services” are defined in the Lanterman Act as “intermittent or regularly scheduled temporary nonmedical care and supervision provided in a client’s own home, for a regional center client who resides with a family member.” (§4690.2, subd. (a).) Subdivision (a) of section 4690.2 goes on to state that respite services are designed to “do all of the following:

- (1) Assist family members in maintaining the client at home.
- (2) Provide appropriate care and supervision in maintaining the client’s safety in the absence of family members.
- (3) Relieve family members from the constantly demanding responsibility of caring for the client.
- (4) Attend to the client’s basic self-help needs and other activities of daily living including interaction, socialization, and continuation of usual daily routines which would ordinarily be performed by family members.”

12. Out-of-home respite is defined in the pertinent regulations as “intermittent or regularly scheduled temporary care to individuals in a licensed facility and which: 1) are designed to relieve families of the constant responsibility of caring for a member of that family who is a consumer; 2) meet planned or emergency needs; 3) are used to allow parents or the individual the opportunity for vacations and other necessities or activities of family life; and 4) are provided to individuals away from their residence.” (Cal. Code Regs., tit. 17, § 54342, subd. (a)(58)(E).) Thus, out-of-home respite is different from in-home respite in two major respects: it is provided out of the home, and it is used for planned or emergency absences from the home.

13. Effective July 1, 2009, limits were imposed on a regional center’s ability to purchase respite care for the families of consumers. Specifically, section 4686.5 was added to the Lanterman Act. It provides that a regional center shall not purchase more than 90 hours of in-home respite in a quarter of one year. (§ 4686.5, subd. (a)(2).) However, a regional center may grant an exemption, and provide more of such services, where it is demonstrated either that more than 90 hours per quarter of respite care is required in order to maintain the Claimant in the family home, or where it has been established that there has been an extraordinary event that impacts the family’s ability to meet the care and supervision needs of Claimant. The new statute also makes clear that in order to obtain respite care, it must be shown that the family’s needs for such exceed those of a family of a child without disabilities. (§ 4686.5, subd. (a)(1).)

14. Section 4646.4 was also added to the Lanterman Act as a cost-containment measure in response to the current state budget crisis. In particular, section 4646.4, subdivision (a), requires regional centers, among other cost saving measures, to conform to their purchase of service guidelines, and utilize available generic resources. However, a service policy established by a regional center to govern the provision of services may not take precedence over the established individual needs of the consumer. (*Association of Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 390-393.)

15. The Service Agency's new policy prohibiting the use of OOH respite hours in the home, provides for a maximum of 30 hours per month of IH respite as required by section 4686.5, subdivision (a)(2). A person who believes that more IH respite is needed, must seek an exception from the new rule. Otherwise, the disabled person should use OOH respite for the proper purpose, that is, to allow the care-giving family members to respond to emergencies or to take long breaks from service or a vacation.

16. Based on all the foregoing, Claimant's appeal must be denied.

ORDER

Claimant's appeal is denied. The Service Agency is not required to use out of home respite hours to provide in home respite unless it cannot provide an appropriate out of home placement for Claimant, at a duly licensed and vendored facility.

March ___, 2012

GLYNDA B. GOMEZ
Administrative Law Judge
Office of Administrative Hearings